IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
Murphy, P.J., and Gleicher and Letica, JJ.

COUNCIL OF ORGANIZATIONS AND OTHERS FOR EDUCATION ABOUT PAROCHIAID (CAP), AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN (ACLU), MICHIGAN PARENTS FOR SCHOOLS, 482FORWARD, MICHIGAN ASSOCIATION OF SCHOOL BOARDS, MICHIGAN ASSOCIATION OF SCHOOL ADMINISTRATORS, MICHIGAN ASSOCIATION OF INTERMEDIATE SCHOOL ADMINISTRATORS, MICHIGAN SCHOOL BUSINESS OFFICIALS, MICHIGAN ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS, MIDDLE CITIES EDUCATION ASSOCIATION, MICHIGAN ELEMENTARY AND MIDDLE SCHOOL PRINCIPALS ASSOCIATION, KALAMAZOO PUBLIC SCHOOLS, and KALAMAZOO PUBLIC SCHOOLS BOARD OF EDUCATION,

Plaintiffs-Appellants,

v.

STATE OF MICHIGAN, GOVERNOR, DEPARTMENT OF EDUCATION, and SUPERINTENDENT OF PUBLIC INSTRUCTION,

Defendants-Appellees.

MSC No. 158751

COA No. 343801

Trial Ct No. 17-000068-MB

**THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID**

---

# PLAINTIFFS-APPELLANTS' REPLY TO AMICI

[CAPTION CONTINUED ON NEXT PAGE]

WHITE SCHNEIDER PC
Jeffrey S. Donahue (P48588)
Andrew J. Gordon (P80211)
1223 Turner St., Suite 200
Lansing, MI 48906
(517) 349-7744

*Attorneys for Plaintiff-Appellant Council of Organizations and Others for Education About Parochiaid (CAP)*

AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN
Daniel S. Korobkin (P72842)
2966 Woodward Avenue
Detroit, MI 48201
(313) 578-6800

*Attorney for Plaintiffs-Appellants ACLU of Michigan, Michigan Parents for Schools, and 482Forward*

DICKINSON WRIGHT PLLC
Peter H. Ellsworth (P23657)
Jeffery V. Stuckey (P34648)
Brandon C. Hubbard (P71085)
215 S. Washington Square, Suite 200
Lansing, MI 48933
(517) 487-4724

Phillip J. DeRosier (P55595)
Ariana D. Pellegrino (P79104)
500 Woodward Avenue, Suite 4000
Detroit, MI 48226
(313) 223-3500

*Attorneys for Plaintiffs-Appellants Michigan Association of School Boards, Michigan Association of School Administrators, Michigan Association of Intermediate School Administrators, Michigan School Business Officials, Michigan Association of Secondary School Principals, Middle Cities Education Association, Michigan Elementary and Middle School Principals Association, Kalamazoo Public Schools, and Kalamazoo Public Schools Board of Education*

## TABLE OF CONTENTS

## INDEX OF AUTHORITIES

**Cases**



**Statutes**



**Other Authorities**



**Constitutional Provisions**

## I. INTRODUCTION

The parties agree that MCL 388.1752b provides public funding to private schools in violation of Const 1963, art 8, § 2,[1] and that § 152b can be invalidated without running afoul of the United States Constitution. (See Plaintiffs' Br, pp 13-28; State Defendants' Br, pp 1-3, 28-33). The Attorney General shares that view as well. (See AG's Amicus Br, pp 2-3).

Several amici have since filed briefs urging the Court to uphold § 152b on one, or both, of the following grounds: (1) that it does not violate Article 8, § 2;[2] or (2) that if it does, then Article 8, § 2 itself violates the Free Exercise Clause of the First Amendment.[3]

Amici are mistaken. As the Court of Claims and the Court of Appeals dissent properly recognized, Article 8, § 2 plainly prohibits the sort of direct public funding of nonpublic schools for which § 152b provides. And that conclusion is not undermined by anything in this Court's decision in *Traverse City Sch Dist v Attorney General*, 384 Mich 390; 185 NW2d 9 (1971).

Although not an issue raised by the parties or decided by the lower courts, Justice Markman asked the parties to address "the impact, if any" of the United States Supreme Court's decision in *Trinity Lutheran Church of Columbia, Inc v Comer*, ___ US ___; 137 S Ct 2012; 198 L Ed 2d 551 (2017). In that case, the Court held that a state cannot require an institution to "renounce its religious character in order to participate in an otherwise generally available public

---

[1] The only possible exception being for transportation-related funding, as Article 8, § 2 expressly states that "[t]he legislature may provide for the transportation of students to and from any school."

[2] See Proposed Amicus Br of Individual Legislators, pp 8-9, 11-25; Amicus Br of Immaculate Heart of Mary and First Liberty Institute, pp 13-15; Amicus Br of Michigan Catholic Conference and Michigan Association of Non-Public Schools, pp 37-50.

[3] See Proposed Amicus Br of Agudath Israel of America, pp 15-21; Proposed Amicus Br of Individual Legislators, pp 9-11; Amicus Br of Immaculate Heart of Mary and First Liberty Institute, pp 15-22; Amicus Br of Michigan Catholic Conference and Michigan Association of Non-Public Schools, pp 17-35.

benefit program, for which it is fully qualified." *Id*. at 2024. That is not what Article 8, § 2 does, as the parties explain in their briefs.[4] It is a "neutral law of general applicability," and thus easily survives First Amendment scrutiny. *Employment Div, Dep't of Human Resources of Oregon v Smith*, 494 US 872, 879; 110 S Ct 1595; 108 L Ed 2d 876 (1990) (citation and internal quotations omitted). And while amici invite the Court to disregard Article 8, § 2's text and examine what they erroneously claim to be an anti-religious "motivation" behind it, the Court should decline to do so. There is no legal precedent for invalidating a provision like Article 8, § 2, neutral both on its face and in application, based solely on extrinsic evidence about what may have subjectively motivated millions of voters when they approved it nearly 50 years ago. And even if extrinsic evidence could be used in the appropriate case, it would not be proper to do so here because there is no evidence in the record, the issue was not raised or briefed by the parties, and the lower courts did not address the issue.

This Court should, therefore, reverse the Court of Appeals' decision and reinstate the Court of Claims' decision.

## II. ARGUMENT

### A. Amici misinterpret the line between permissible and impermissible aid under Article 8, § 2 and this Court's decision in *Traverse City Sch Dist.*

In arguing that the appropriations under § 152b do not constitute impermissible "aid" to nonpublic schools, amici badly misread this Court's decision in *Traverse City Sch Dist.* That decision did *not* authorize direct funding of nonpublic schools so long as it is for "health, safety,

[4] See also Amicus Br of Public Funds Public Schools, p 6 n 3, and Amicus Br of National School Boards Association, pp 3-5.

and welfare measures" as opposed to educational purposes.[5] Instead, as the Court of Appeals dissent properly recognized, this Court in *Traverse City Sch Dist* "took great pains" to distinguish between "direct funding" of nonpublic schools—which is flatly prohibited—and providing services "to nonpublic school students but funded entirely through payments to *public* schools." (COA Concurrence/Dissent at 4, App 36a (emphasis in original)).

It did so by focusing on the element of "control," which is key to distinguishing between aid "that is a 'primary' element of the support and maintenance of a private school" and that which is "only 'incidental' to the private schools[']support and maintenance." *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41, 48 n 2; 228 NW2d 772 (1975), citing *Traverse City Sch Dist*, 384 Mich at 413.

Applying this distinction to "shared time" instruction, this Court explained that "shared time at a nonpublic school provides only incidental aid" because such a program is "under the complete control of the public school district." *Traverse City Sch Dist*, 384 Mich at 416. In such programs, the state provides instruction to children directly; any benefit to the nonpublic school itself is entirely incidental. For that same reason, "shared time" did not "support . . . the employment of any person at any such nonpublic school" because it only provided for "the employment of *public* school teachers." *Id.* at 416 (emphasis added). The fact that those teachers were to "perform some or all of their services" at a nonpublic school did not "alter the location of their employment" because they still "dr[e]w their check" from their regular school and the work they performed was "under such conditions of control as a public school." *Id.* Finally, to the extent that "non-instructional public school employees" were to make even

[5] This is the central premise of the proposed amicus brief filed by the Individual Legislators (pp 9-11, 18-21), as well as the amicus briefs filed by the Michigan Catholic Conference and Michigan Association of Non-Public Schools (pp 1-4, 34, 38-40) and Immaculate Heart of Mary and First Liberty Institute (pp 13-15).

"regular visitations" to a nonpublic school, the Court found that such visitations would not be improper provided that they are "not so extensive as to constitute the nonpublic school as the regular and usual work station of the public school employees." *Id.*

Similarly, this element of control was critical to the Court's approval of "the provision of auxiliary services . . . to nonpublic school students at any nonpublic school." *Id*. at 417. As with shared time, the state provides auxiliary services to children directly; any benefit to the nonpublic school itself is incidental. Amici myopically focus on the Court's characterization of these "general health and safety measures" as being "incidental" to instruction, *id*. at 418, but what is also critical is that they are state services directly provided to children, not aid or maintenance to the nonpublic schools. Thus, the Court emphasized that the auxiliary services at issue were "performed by public employees under the exclusive direction of public authorities." *Id*. This control is what distinguishes the auxiliary services for children that the Court approved in *Traverse City Sch Dist* from § 152b's direct funding mechanism. In arguing that providing funds directly to nonpublic schools is permissible to the extent that they are not used to provide instruction, amici completely ignore the requirement of "control" that the *Traverse City Sch Dist* Court found to be pivotal to its decision.

The upshot of *Traverse City Sch Dist* is that Article 8, § 2 does not prohibit public employees from providing either shared-time instruction or general health and safety services whenever doing so might incidentally benefit a nonpublic school. That is a far cry from what amici are asserting, which is that the state can provide public funds directly to nonpublic schools in order to help them function as schools. In addition to the fact that no such holding can be found in *Traverse City Sch Dist*, direct public funding is flatly prohibited by the plain text of

Article 8, § 2 as written and ratified by the voters, providing that "[n]o public monies shall be appropriated or paid . . . directly or indirectly to aid or maintain any . . . nonpublic . . . school."

**B. Invalidating § 152b would not violate the Free Exercise Clause.**

Amici are also incorrect when they assert that nullifying § 152b under Article 8, § 2 would violate the Free Exercise Clause of the United States Constitution. It would not.[6] *Trinity Lutheran* confirmed a long line of Supreme Court precedent holding that state laws must be "neutral and generally applicable without regard to religion," and cannot "single out the religious for disfavored treatment." *Trinity Lutheran*, 137 S Ct at 2020. Article 8, § 2 easily meets those requirements, as it applies to all "nonpublic" schools. It draws a line between public and nonpublic schools; it does not, as amici claim, single out "religious" schools like the Missouri constitutional provision at issue in *Trinity Lutheran* did. Any impact on religious schools is merely incidental, and thus does not present Free Exercise concerns. *Employment Div*, 494 US at 878 (observing that the First Amendment is not "offended" by the "incidental effect of a generally applicable and otherwise valid provision").

Several of the amici accuse Article 8, § 2—which began as Proposal C—of being a so-called "Blaine Amendment" that was the product of anti-Catholic sentiment.[7] That claim is misplaced here. *First*, as a historical matter it is misleading to label Article 8, § 2 a "Blaine Amendment." The phenomenon of adding so-called Blaine amendments to state constitutions occurred "during the late nineteenth and early twentieth century." Heytens, *School Choice and*

---

[6] The Court should decline even to reach this issue because it was not raised by the parties or addressed by the lower courts. See *United Parcel Serv, Inc v Mitchell*, 451 US 56, 60 n 2; 101 S Ct 1559; 67 L Ed 2d 732 (1981) (declining to consider issue raised by amicus curiae "since it was not raised by either of the parties here or below").

[7] See Amicus Br of Michigan Catholic Conference and Michigan Association of Non-Public Schools (pp 4-6); Amicus Br of Immaculate Heart of Mary and First Liberty Institute (pp 7-22); Proposed Amicus Br of Agudath Israel of America (pp 8-1, 15-21).

*State Constitutions*, 86 Va L Rev 117, 134 (2000); see also *id.* at 123 n 32 (describing Blaine amendments as enacted "between 1877 and 1917"); *id*. at 134 n 97 (same). By contrast, Article 8, § 2 of Michigan's Constitution was proposed and adopted in 1970—long after the addition of so-called Blaine amendments into state constitutions. And Article 8, § 2 is unlike the so-called Blaine amendments in another respect: it prohibits the public funding of *all* private schools, not just religious institutions. See DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv J L & Pub Pol'y 551, 588-589 (2003). Michigan's situation has been described as "unique," not fitting neatly into the history or pattern of other state constitutions' funding restrictions. *Id*.

*Second*, courts are generally unwilling to entertain claims about the "motivation" behind a facially neutral law when doing so would require an inquiry into whether (and how many) voters cast their ballot for subjectively discriminatory reasons, as opposed to non-discriminatory reasons that were also publicly voiced and plausibly justified the result obtained. See *Clarke v City of Cincinnati*, 40 F3d 807, 815-816 (CA 6, 1994) ("[A]bsent a referendum that facially discriminates racially, or one where although facially neutral, the only possible rationale is racially motivated, a . . . court cannot inquire into the electorate's motivations.") (internal quotations omitted); see also *Nat'l Pride at Work, Inc v Governor*, 481 Mich 56, 83-84; 748 NW2d 524 (2008) ("The role of this Court is not to determine who said what about the amendment before it was ratified, or to speculate about how these statements may have influenced voters."). The Supreme Court recently considered extrinsic evidence of motive in evaluating government action in *Masterpiece Cakeshop, Ltd v Colorado Civil Rights Comm*, ___ US ___; 138 S Ct 1719; 201 L Ed 2d 35 (2018), but that was because "the remarks were made in a very different context—by an adjudicatory body deciding a particular case." *Id*. at 1730.

Amici cite *Church of Lukumi Babalu Aye, Inc v Hialeah*, 508 US 520; 113 S Ct 2217; 124 L Ed 2d 472 (1993), as support for their approach, but that part of Justice Kennedy's opinion, relying on "circumstantial evidence" to determine the subjective motivation behind the ordinances at issue, did not garner a majority vote. See *id.* at 540 (Kennedy, J., joined by Stevens, J.).[8] Instead, the majority examined the ordinances' "object" in light of their "text" and "real operation," applying only to the targeted religious practice. *Id.* at 534-539. See also *Grossbaum v Indianapolis-Marion Co Bldg Auth*, 100 F3d 1287, 1292 (CA 7, 1996) (discussing *Lukumi* and noting that "[t]he subjective motivations of government actors should . . . not be confused with . . . the 'object' of a law. The Court [in *Lukumi*] . . . made [its] determination by analyzing both the text and the effect in "real operation" of the ordinances. The Court did not, however, analyze the motive behind the ordinances.") (citations omitted).

Article 8, § 2 is nothing like the ordinances at issue in *Lukumi*. Article 8, § 2 is both neutral on its face *and* in its operation. It prohibits the funding of *all* nonpublic schools, regardless of whether they are Catholic, Protestant, Muslim, Jewish, or secular. That is also how it operates in practice: thousands of children attend private schools in Michigan with no Catholic affiliation, and many with no religious affiliation at all. Thus, unlike in *Lukumi*, Article 8, § 2 is not targeted to apply only to Catholic schools, or religious school generally. It applies to all private schools.[9]

---

[8] Such evidence, Justice Kennedy suggested, "includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.*

[9] Despite the assertion by Immaculate Heart of Mary and First Liberty Institute (p 23 of their brief), this makes Article 8, § 2 different from the Montana constitutional provision at issue before the United States Supreme Court in *Espinoza v Montana Dep't of Revenue*, No. 18-1195.
Footnote continued on next page …

*Third*, even if it were permissible to consider extrinsic evidence concerning the history of Article 8, § 2, the Court should decline to do so here. Attempting to determine the motivation behind a statute or constitutional provision is questionable at best. "Government actions may be taken for a multiplicity of reasons, and any number of people may be involved in authorizing the action." *Grossbaum*, 100 F3d at 1293. That is especially true here. How does one even begin to determine the motives of the electorate that ratified Proposal C? Amici cite Plaintiff CAP's website and a smattering of letters to the editor, newspaper articles, and campaign literature from fifty years ago, but this is a thin basis on which to find that anti-Catholic or anti-religious animus (as opposed to support for public schools)[10] was the determining factor motivating Article 8, § 2's adoption by the people of Michigan.

Amici also ignore the fact that Article 8, § 2 was reauthorized by popular vote in November 2000. In that election, voters were asked to eliminate the ban on indirect support of nonpublic schools and permit the use of tuition vouchers. The ballot measure was defeated by an overwhelming vote of 69% to 31%, with over four million votes cast. See State of Michigan Bureau of Elections, *Initiatives and Referendums Under the Constitution of the State of Michigan of 1963* (January 2019), p 5, available at <https://goo.gl/3RMzjR>. There has been no claim that this vote was motivated by anti-religious animus, and it eradicates any alleged discriminatory purpose that could even conceivably be attributed to Proposal C. See *Rostker v Goldberg*, 453 US 57, 74-75; 101 S Ct 2646; 69 L Ed 2d 478 (1981) (examining Congress' reconsideration, in

---

Footnote continued from previous page …

That provision specifically singles out churches, schools, and other institutions "controlled in whole or in part by any church, sect, or denomination." Mont Const, art 10, § 6.

[10] See, e.g., the historical discussion of Article 8, § 2 in the amicus brief submitted by Public Funds Public Schools, at pp 8-10.

1980, of the question of exempting women from the military draft in determining the constitutional validity of the Selective Service Act of 1948).

Even when it is appropriate to do so (and it is not here), "[t]he task of assessing a jurisdiction's motivation . . . is not a simple matter; on the contrary, it is an inherently complex endeavor, one requiring the trial court to perform a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Hunt v Cromartie*, 526 US 541, 546; 119 S Ct 1545; 143 L Ed 2d 731 (1999) (citation and internal quotations omitted). That reality makes this case a poor vehicle for attempting to determine whether Article 8, § 2 was, as amici claim, motivated by anti-religious animus. No such issue was raised or addressed below, and there is no evidentiary record on the question.

The Court should follow the lead of the United States Supreme Court in *Locke v Davey*, 540 US 712; 124 S Ct 1307; 158 L Ed 2d 1 (2004), and decline to consider Article 8, § 2's history. The amici in *Locke* were opposed to restrictions imposed by the state of Washington on students' use of state-funded scholarships "at an institution where they are pursuing a degree in devotional theology." *Id*. at 715. In holding that this "exclusion from an otherwise inclusive aid program" did not violate the Free Exercise Clause, the Supreme Court rejected the amici's attack on Washington's constitution as having been "born of religious bigotry because it contains a so-called 'Blaine Amendment.'" *Id*. at 723 n 7. This was because *Locke* involved a *different* constitutional provision (Article 1, § 11) having no "credible connection" to the provision that amici claimed to be a Blaine Amendment (Article 4, § 14). *Id*. Similarly here, there is no "credible connection" between so-called "Blaine Amendments" and Article 8, § 2. Amici's questionable and one-sided historical account should play no role in the Court's decision.

## III. CONCLUSION AND RELIEF REQUESTED

In short, amici curiae do nothing to advance the cause of upholding the constitutionality of § 152b as the Court of Appeals majority concluded. Plaintiffs respectfully request that the Court reverse the Court of Appeals' decision and reinstate the Court of Claims' decision finding § 152b to violate Article 8, § 2.

Respectfully submitted,

WHITE SCHNEIDER PC

/s/ Jeffrey S. Donahue (w/ permission)
By: _____
Jeffrey S. Donahue (P48588)
Andrew J. Gordon (P80211)
1223 Turner St., Suite 200
Lansing, MI 48906
(517) 349-7744

*Attorneys for Plaintiff-Appellant Council of Organizations and Others for Education About Parochiaid (CAP)*

AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN

/s/ Daniel S. Korobkin (w/ permission)
By: _____
Daniel S. Korobkin (P72842)
2966 Woodward Avenue
Detroit, MI 48201
(313) 578-6800

*Attorney for Plaintiffs-Appellants ACLU of Michigan, Michigan Parents for Schools, and 482Forward*

DICKINSON WRIGHT PLLC
Peter H. Ellsworth (P23657)
Jeffery V. Stuckey (P34648)
Brandon C. Hubbard (P71085)
215 South Washington Square, Suite 200
Lansing, MI 48933
(517) 371-1730

/s/ Phillip J. DeRosier
By: _____
Phillip J. DeRosier (P55595)
Ariana D. Pellegrino (P79104)
500 Woodward Avenue, Suite 4000
Detroit, MI 48226
(313) 223-3500

*Attorneys for Plaintiffs-Appellants Michigan Association of School Boards, Michigan Association of School Administrators, Michigan Association of Intermediate School Administrators, Michigan School Business Officials, Michigan Association of Secondary School Principals, Middle Cities Education Association, Michigan Elementary and Middle School Principals Association, Kalamazoo Public Schools, and Kalamazoo Public Schools Board of Education*

Dated: January 7, 2020